



March 1, 2001

Mr. Craig Underwood
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OR2001-0767

Dear Mr. Underwood:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144563.

The Teacher Retirement System of Texas ("TRS") received a request for the responses to two Requests for Offers ("RFOs"). TRS does not assert an exception to disclosure of the requested information on its own behalf. However, you indicate that the requested information may implicate the proprietary rights of certain third parties. You state that you have notified seventeen effected companies under section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You also state that five of the seventeen companies have indicated that they have no objection to the release of their information. Moreover, nine of the companies failed to submit comments to this office explaining why their information should not be released. Therefore, we have no basis to conclude that the information of fourteen of the effected companies is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, your office must release the requested information pertaining to these companies.

Nonetheless, three of the effected companies—Business Control Systems, Maxim Solutions Group, and RFD & Associates—have submitted arguments to this office for withholding the requested information. Each company asserts that some of the information they supplied to TRS in response to an RFO is excepted from disclosure under section 552.110 of the

Government Code. RFD & Associates further asserts that portions of its information are excepted from disclosure under section 552.104 of the Government Code. We have considered the asserted exceptions and reviewed the submitted information.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. See Open Records Decision No. 661 (1999).

Business Control Systems contends that the Vendor/Supplier Information Form submitted as part of its offer "was submitted erroneously and is private information internal to BCS under Section 552.110" However, Business Control Systems wholly fails to explain how its Vendor/Supplier Information Form constitutes a trade secret and does not attempt to show that release of the form would result in substantial competitive harm to it. Therefore, we find that Business Control Systems has failed to demonstrate that section 552.110 of the Government Code is applicable to the information it submitted to TRS. Therefore, you must release Business Control System's information to the requestor.

Likewise, Maxim Solutions Group contends that the resource biographies and references it submitted to TRS in response to the RFO are excepted under section 552.110. However, while Maxim asserts that this information is confidential and "competing companies should not be able to view" it, Maxim does not demonstrate how any of its information constitutes a trade secret nor does it explain how release of its information would result in substantial competitive harm. Therefore, Maxim has not demonstrated that section 552.110 of the Government Code is applicable to its information. Consequently, you must release Maxim's information to the requestor as well.

Finally, RFD & Associates contends that the following information is excepted under section 552.110(b): the work outline of the project, the time estimated to complete the project, the compensation rate, the duration and cost of optional services, and the identity of RFD personnel. RFD specifically states that disclosure of this information to the requestor "could unfairly benefit [the requestor] in future competition against RFD with respect to similar projects or services by, among other things, enabling [the requestor] to simulate RFD's practices and services and to underbid RFD on similar projects." Furthermore, RFD contends that disclosure of its personnel could enable the requestor "to contact and/or solicit the services of such personnel to the detriment of RFD." Based on RFD's arguments, and our review of the information, we find that RFD has adequately demonstrated that release of its work outline, estimated completion time, compensation rate, duration and cost of optional services, and the identity of its personnel would cause substantial competitive injury to RFD. Therefore, you must withhold this information, which we have marked, under section 552.110(b) of the Government Code. Based on this finding we need not reach RFD's argument under section 552.104 of the Government Code.

In summary, you must withhold certain marked information in RFD's documents under section 552.110(b). However, the remainder of the responsive information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

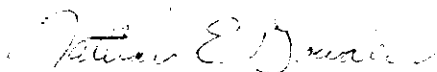
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 144563

Encl: Submitted documents

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